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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 425

FANCHON & MARCO, INC., *Petitioner*,

v.

PARAMOUNT PICTURES, INC., ET AL., *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTIONS OF LAW

Petitioner's grievance is not, as is argued by respondents (Brief, pp. 12-13), that in the decisional process the trial judge weighed the evidence pro and con, and decided the case against petitioner solely on questions of fact; and therefore the appeal related entirely to questions of fact. Petitioner's complaint is precisely the opposite: (1) that in the decisional process the facts shown by petitioner's evidence were eliminated from consideration by a supposed rule of law; (2) that those facts were deemed to

have been rebutted by testimony of incompetent witnesses which was totally without any probative value; and (3) that those facts were held to be insufficient for recovery by petitioner because of another supposed rule of law. Substantial and important facts were eliminated (1) by a presumption erroneously supposed to be required by law that the matters shown by the judgment in the Paramount case, which were received by the district court without limitation or reserve, terminated upon entry of the judgments, even though by the express terms of the judgments termination of the unlawful acts and conditions was postponed for a long time to come; other substantial and important facts were deemed to have been rebutted (2) by the testimony of four witnesses, who had no knowledge or participation, that they personally had no discussions with others about the denial of pictures for petitioner's theatre; and all of the facts were held to be insufficient (3) because of a supposed rule of law that petitioner could recover only by proving that the refusals of pictures were unreasonable as well as conspiratorial and injurious.

As there is no such presumption as that used by the district court; as there is no rule that conspiratorial refusals to furnish pictures are not unlawful unless also unreasonable; and as any factual decision based on the incompetent testimony, was clearly erroneous as a matter of law—the decisional process was wholly vitiated and petitioner was deprived of its right to have the court reach a decision by a consideration and weighing of the evidence pro and con, unaffected by such supposed rules and incompetent evidence.

FIRST RUNS ONLY FOR FILM COMPANY THEATRES

Respondents not only deny that first run pictures were limited to theatres affiliated with them and other defendants in the Paramount case, but assert that many first run pictures were licensed by them to independent

exhibitors, and that Loew's licensed "all" of its pictures first run to one or more "independent" exhibitors, who are named in the brief as (1) United Artists Theatres Circuit, (2) Metropolitan Theatres Corporation, (3) Galston & Sutton and (4) Sherill Corwin. (Brief in Opposition, pp. 3-4, 6, 9, 15.) The brief contains citations only for the statement that Loew's licensed "all" of its pictures for first run to the four exhibitors named. Examination of the exhibit and the record places cited, discloses no reference whatever to furnishing first run pictures to independents.

The evidence shows that up to the time of trial in 1951 a severely restrictive condition as to first runs had long existed in the Los Angeles area. Although during at least ten or twelve years preceding the trial, the Los Angeles population increased and spread over the area by leaps and bounds—almost one million people in ten years—with one possible exception, no new proprietor had been able to enter the first run exhibition business in the area.

Twelve years prior to the trial there were thirteen first run houses in Los Angeles, with six owners. At the time of the trial there were thirty-three first run theatres, with only one new owner. (R. 499-501, 574-581, 3105-3109) The new owner was United Artists Theatre Circuit, whose president is the brother of the president of Fox West Coast Theatres, and of the president of Twentieth Century-Fox Film Corporation. (R. 502-503) Sixteen or seventeen of the first run theatres added during the twelve years, were operated by respondent Fox West Coast Theatres, and the other two by Warner. At least eleven of the additional Fox first run theatres were acquired by Fox from independents. When operated by the independents the theatres were restricted to second or later runs but when acquired by Fox, were promptly moved into the first run rank. (R. 518-523, 540-548) The eleven theatres are as follows:

1	Studio	880 seats
2	El Rey	861 "
3	Los Angeles	2097 "
4	Guild	965 "
5	Belmont	842 "
6	Fox Wilshire	2296 "
7	Ritz	
8	Uptown	1715 "
9	Four Star	900 "
10	Globe	782 "
11	Vogue	897 "

Conversely, every independent exhibitor who sought pictures from respondents and the other defendants in the Paramount case for first run use, was refused. The following nine independently operated theatres are named in the evidence as having been refused first run by every major company to which they applied, five of them being large, newly constructed, modern theatres:

Baldwin	1800 seats
Pickwood	1650 "
La Tijera	1500 "
Paradise	1300 "
Imperial	
Campus	850 "
Bard's Adams	1400 "
Manchester	1668 "
Leimert	1185 "

(R. 2412, 2414, 2416, 2423, 3147, 3231, 3280, 3374-3375, 3466-3467; Exs. AL, AM, AN, AO, AP, AQ, AR.)

The only variation from unanimous downright refusal to the independents was an offer of RKO to receive bids from the independents against the Fox West Coast Culver theatre, but only on pictures not desired for first run use at the RKO houses. (R. 3374)

That first run pictures were refused for the Baldwin theatre because it was remotely located, as is intimated in respondents' brief (p. 2), is not correct. The map on page 7 shows the locations of the Baldwin and the thirty-

three first run theatres as of the time laid in the complaint. It shows that the Baldwin was as near to the Los Angeles civic center as five of the first run theatres, and nearer than seven.

The theatres appearing on the map are:

1. Baldwin

Fox West Coast Theatres

2. Belmont
3. Carthay
4. Chinese
5. Culver
6. El Rey
7. Fine Arts
8. Wilshire
9. Globe
10. Guild
11. Iris
12. Los Angeles
13. Loyola
14. Orpheum
15. Ritz
16. Studio
17. Uptown
18. Vogue

Other Vertical Combination Theatres

19. Music Hall
20. Music Hall
21. Music Hall
22. Music Hall
23. Egyptian
24. Forum
25. Four Star
26. Loew's State
27. Pantages
28. RKO Hill Street
29. United Artists
30. Warner
31. Warner
32. Wiltern

Independent Theatres

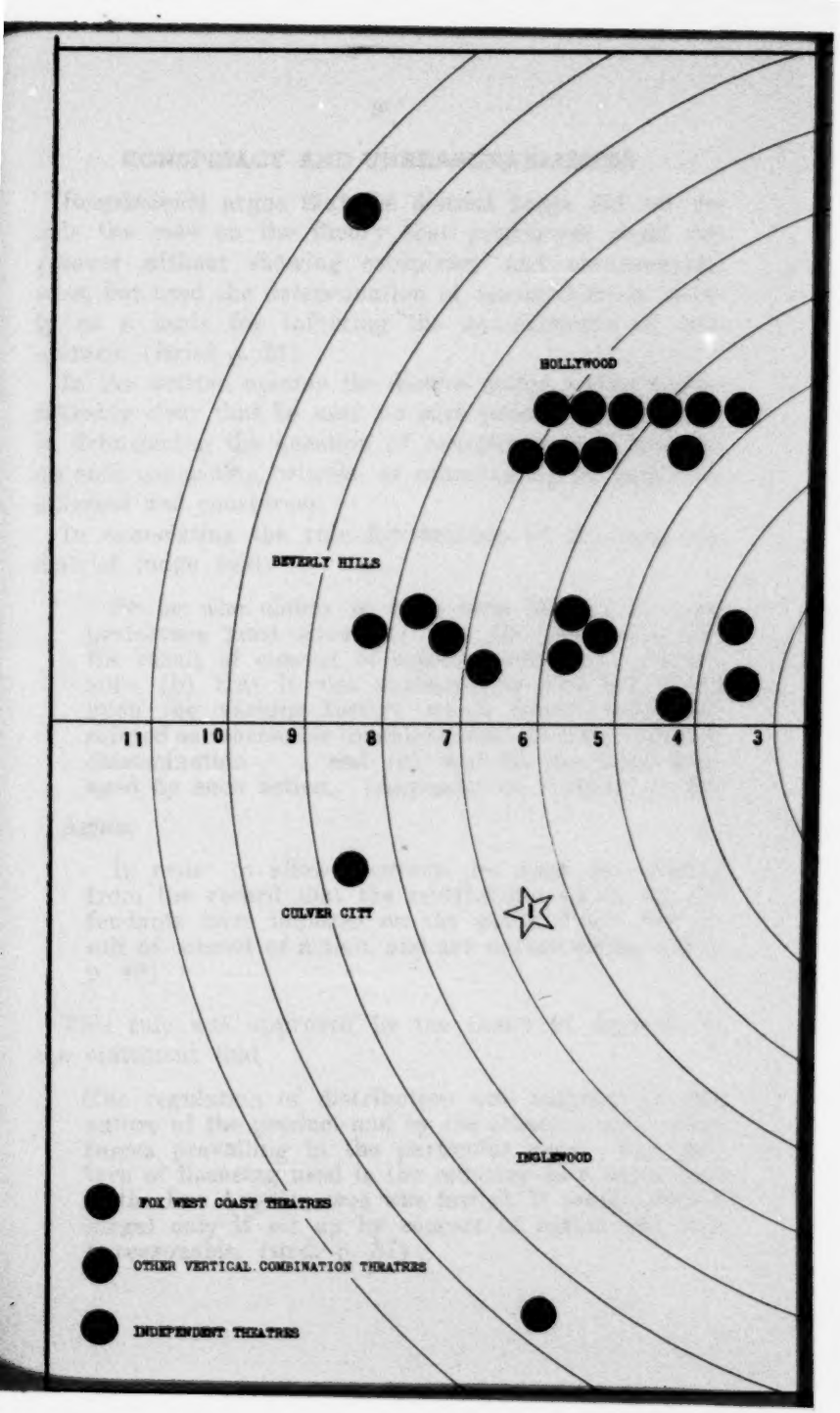
33. Paramount Hollywood
34. Paramount Los Angeles

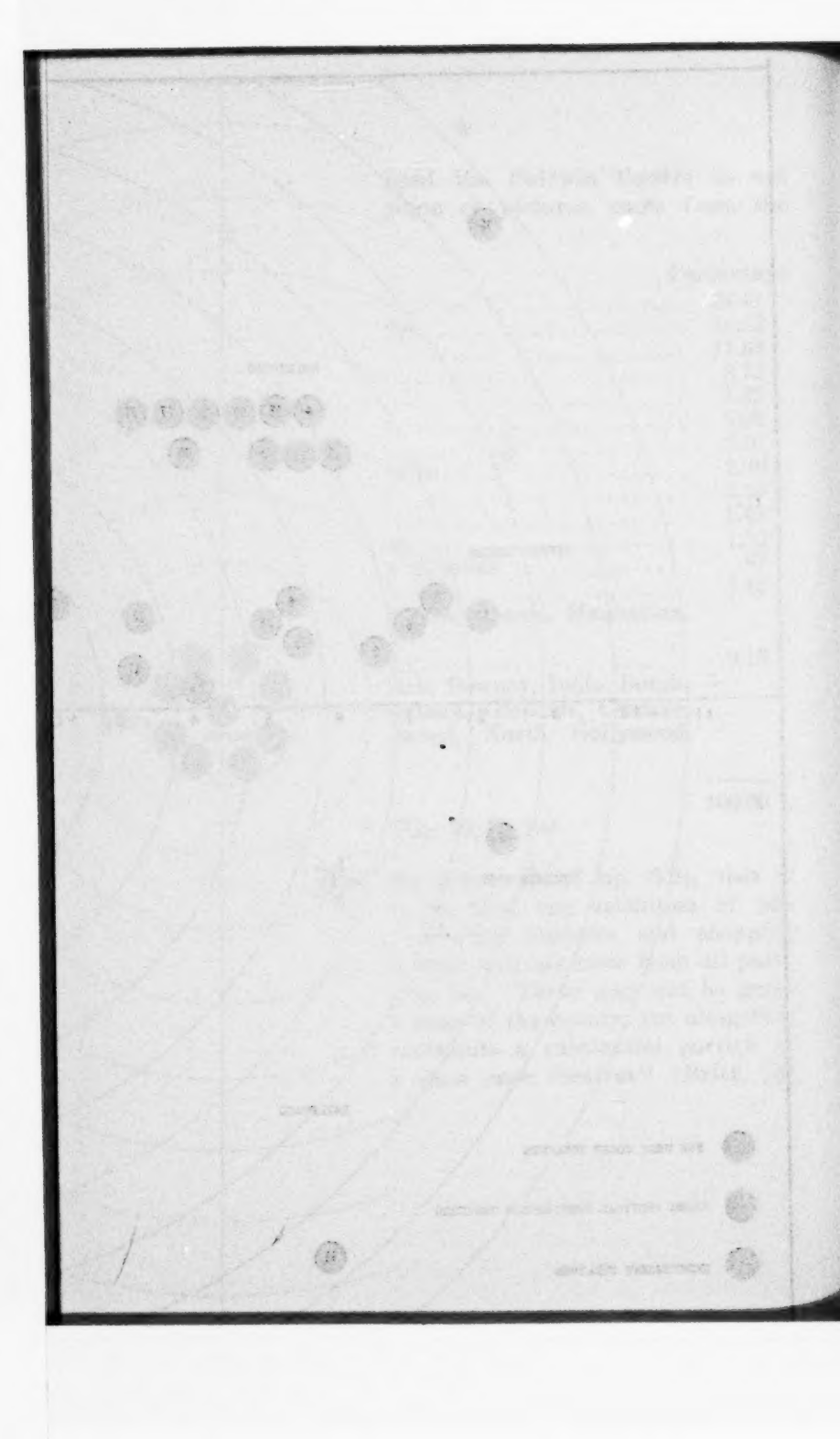
People who patronized the Baldwin theatre to see the second run exhibition of pictures, came from the following areas:

Area	Percentage
1 Baldwin Hills	24.47
2 Wilshire district	18.63
3 Inglewood	11.91
4 Culver City	8.72
5 Westchester	7.35
6 Crenshaw area	5.07
7 Beverly Hills	3.01
8 West Los Angeles	2.36
9 Hollywood	2.19
10 Florence area	1.49
11 Hawthorne area	1.32
12 Downtown Los Angeles	.87
13 Beach areas (Redondo, Hermosa, Venice, Manhattan, Playa Del Rey)	3.42
14 Miscellaneous (Huntington Park, Downey, Indio, Southgate, Santa Barbara, Glendale, Chicago, Altadena, Lynwood, North Hollywood, Tujunga)	9.19
	100.00

(Exs. 76, 77, 78)

Although respondents argue (brief pp. 6-9), that it is essential to confine the first run exhibition of pictures to theatres in crowded business and shopping centers, they state that their patrons came from all parts of the Los Angeles area, i.e., "There may not be great numbers from any one area of the county, but altogether the suburban areas contribute a substantial portion of the patronage of the show case theatres" (Brief, pp. 7-8).


HOLLYWOOD
BEVERLY HILLS
11
10
9
8
7
6
5
4
3
CULVER CITY
INGLEWOOD
FOX WEST COAST THEATRES
OTHER VERTICAL COMBINATION THEATRES
INDEPENDENT THEATRES



CONSPIRACY AND UNREASONABLENESS

Respondents argue that the district judge did not decide the case on the theory that petitioners could not recover without showing conspiracy and unreasonableness, but used the determination of reasonableness merely as a basis for inferring the non-existence of conspiracy. (Brief p. 21)

In the written opinion the district judge makes unmistakeably clear that he used no such process of inference in determining the question of conspiracy, and intended no such connection between or commingling of unreasonableness and conspiracy.

In enunciating the rule for decision of the case, the district judge said:

> So he who claims to have been injured by such preference must show (a) that the preference was the result of concert of action between the defendants, (b) that it was unreasonable and not based upon the various factors which courts have considered as reasonable considerations entering into such determination . . ., and (c) that he has been damaged by such action. (Appendix to Petition, p. 47)

Again,

> In order to allow recovery, we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of concert of action, and are unreasonable. (ibid. p. 49)

This rule was approved by the Court of Appeals in the statement that

> The regulation of distribution was required by the nature of the product and by the economic and social forces prevailing in the particular area. The pattern of licensing used in the industry as a whole and in the Los Angeles area was lawful. It would become illegal only if set up by concert of action and was unreasonable. (ibid. p. 37)

In addition to the statements referred to in the Petition (pp. 14-22, 29-30), to the effect that reasonableness is controlling and is a factor apart from conspiracy, at the close of the trial the district judge said:

> So the problem that we have to decide is not so much, as I have told you repeatedly, whether what was done before was continued to the present time, but, first, whether what was done after was the outcome of the conspiracy, and, second, whether it was unreasonable as to the particular plaintiff. If it is reasonable, it does not make any difference how dark the conspiracy, how villainous it may be. (R. 3948)

DENIALS

Respondents state that the executives who made the decisions for refusal of first run pictures for petitioner's theatre and who knew the reasons therefor, appeared as witnesses and denied that the refusals were pursuant to conspiracy, and that the statement in the Petition to the contrary is incorrect. (Brief, pp. 17-18). Although respondents intimate that executives of Paramount, Loew's, RKO, Universal and Fox so testified, not one supporting citation to the record is given; whereas the statements made in the Petition are specific and carefully and copiously supported by citation. (Petition, pp. 12-13, 27-29)

Respectfully submitted,

Russell Hardy,
Henry Schaefer, Jr.,
James Wallace Kemp.

December 1954.